Supreme Court of Indiana.

SHIRK *v.* SHULTZ.

Where an infant partner goes into a court of equity and asks for the appointment of a receiver, he thereby consents that the ultimate rights of all parties shall be settled by the court, according to law and equity, and where he asks the court to take charge of goods purchased by the firm, as part of its assets, he cannot also disaffirm the contract of purchase so as to escape liability therefor, and, at the same time, retain them; and the court will, in such case, treat them as partnership assets, and apply them first to the payment of the firm debts.

APPEAL from Circuit Court, Decatur County.

The appellant, Milton H. Shirk, an infant, by his next friend, brought suit for the appointment of a receiver to take charge of the assets of the firm in which he was a partner, and for the recovery out of said assets of the amount invested by him therein.

Ewing & Ewing, for appellants.
Miller & Gavin, for appellee.

The opinion of the Court was delivered by ZOLLARS, J. Appellant alleges in his complaint that in October, 1884, when he was a minor, he entered into partnership with appellee for an indefinite time, in the business of upholstering and dealing in furniture, under the firm name of Shirk & Shultz; that he still is a minor; that he invested in the business, $500; that the firm has on hand furniture and goods of the value of $850, and is in debt over $600, that "he is advised by his guardian to renounce such partnership, and withdraw from the said firm; and he hereby renounces such arrangement, and asks to avoid, annul, and undo all of his obligations in that behalf;" that Shultz is insolvent, and that the firm creditors will exhaust the assets of the firm unless a receiver shall be appointed to take charge of them, etc. The prayer is for the appointment of a receiver to take charge of the assets of the firm and convert them into money, and pay, *first*, to appellant the amount invested by him, and, *second*, the firm debts. The court made a special finding of facts, in substance, that in October, 1884, Shirk & Shultz entered into

partnership, and continued in business until the commencement of this action, in August, 1885. Shirk is a minor and has a guardian. He entered into a partnership, and put into the business $271.40, with the consent of his guardian. Of that amount, $74.50 was paid to Shultz, to be used in the purchase of goods for the firm, and it was so used. The balance of the $271.40 was paid by Shirk on the debts of the firm, for goods, and labor of employés. During the existence of the firm, Shirk drew out $100. Shultz put into the business $260, and drew out nothing. The assets of the firm, at the time this suit was commenced, amounted in value to $800, and its debts aggregated $700. Shultz is insolvent. Upon the facts so found, the court below concluded, as a matter of law, that the firm should be dissolved, and that a receiver should be appointed to take charge of the firm assets, convert them into money, and pay, *first*, the costs of this suit; *second*, the firm debts and, *third*, divide the surplus, if any, between the partners. A receiver was accordingly appointed. Appellant excepted to the conclusions of law, and contended, and still contends, that, upon the facts found by the court, he is entitled to have refunded to him, from the assets of the firm, the amount which he invested, in preference to the partnership creditors and all others. Whether or not he is so entitled, is the one question for decision.

The facts in the case of *Dunton* v. *Brown*, 31 Mich. 182, were these: Dunton, a minor, entered into partnership with Brown, and put about $100 into the business. After the business had been continued for about three months, Dunton informed Brown that he would no longer continue as a partner, and that if he remained any longer, he must be paid for his services. To that, Brown would not consent. Dunton went away for a while, but subsequently returned, and continued for nine months. After leaving again, he brought an action to recover back the $100 with interest, and for his services. It was held that he could not maintain the action. In speaking of the partnership agreement, it was said: "It is at best only voidable; and we have found no authority which enables the infant or his guardian to determine whether a voidable contract shall be affirmed or annulled while the

infancy continues. It appears to be a matter for his own decision when he arrives at mature age. * * * And it is worthy of consideration whether, inasmuch as the partnership business continued and ended before suit, and before majority, it does not come within the rule which protects executed contracts in many cases. *Squire* v. *Hydliff*, 9 Mich. 274. Without deciding what may happen when the infant reaches majority, we think it impossible to sustain an implied *assumpsit* now, against the terms of the only agreement ever made, which was certainly not a nullity."

In the case of *Bush* v. *Linthicum*, 59 Md. 344, one partner brought a suit for the dissolution of the firm, and the appointment of a receiver to take charge of the firm assets, and pay the firm debts, etc. In bar of the suit, the other partner interposed the plea of his infancy. In the decision of the case, after citing and approving the Michigan case above and the case of *Armitage* v. *Widoe*, 36 Mich. 130, which followed it, the court said: "Having formed this partnership, he cannot so far repudiate it during his minority as to escape such consequences of partnership as do not involve personal liability for claims against the firm, or costs incident to the legal settlement of its affairs. Such partnership must be dissolved as any other; and the partnership assets must be assignable to partnership creditors. What his rights may be as against his adult co-partner, when he reaches majority, we do not decide."

The case of *Kitchen* v. *Lee*, 11 Paige, 107, frequently cited by text writers, was this: Kitchen and Lee were partners. During the existence of the partnership they contracted debts as partners. Kitchen retired from the business, and relinquished to Lee the goods of the firm, upon the condition that he would pay, or procure to be paid, the debts then due from the firm, and indemnify him, Kitchen, against the same. Previous to the retirement of Kitchen from the firm, Lee represented to him that he was twenty-one years of age. Subsequent to the dissolution of the firm, Lee refused to pay the firm debts, upon the ground that he was a minor, and not legally liable to pay such debts; and made a pretended sale of the goods to Price, who paid no consideration, and took them

with knowledge of the facts that the firm debts were not paid, and that the sale to him was fraudulent as against Kitchen. Stating the above facts in his bill, Kitchen prayed for the appointment of a receiver to take charge of the goods and apply them to the payment of the partnership debts. To the bill Lee pleaded that at the time of making the agreement to pay the firm debts he was a minor, and that Kitchen had notice of that fact. WALWORTH, chancellor, held that the contract on the part of Lee to pay the debts was one which he might affirm or repudiate, at his election: but that he could not be permitted to retain all the partnership effects, and at the same time refuse to perform the condition upon which Kitchen's interest in the effects of the firm was to become his property; that if Lee elected to rescind the agreement made, upon the retiring of Kitchen from the business, the latter had a right to insist that his interest in the copartnership effects should be applied to the payment of the debts in the same manner as if the dissolution had not taken place. It was further said: "The rule of law on the subject is that an infant cannot be permitted to retain the property purchased by him, and at the same time repudiate the contract upon which he received it. * * * If the goods in this case had belonged to the complainant (Kitchen) exclusively, at the time of the agreement, and the infant had repudiated his agreement when he became of age, trover or replevin would have been the proper remedy for the goods, if they remained unchanged. *Badger* v. *Phinney*, 15 Mass. 359. But, this being copartnership-property, previous to the agreement, the only remedy of the complainant was in this court; and this plea of infancy is not a full defence to the case made by the bill.

In the case of *Moley* v. *Brine*, 120 Mass. 324, three persons, one of whom was a minor, were partners, and put into the business different amounts. It was held that, upon a dissolution of the partnership, the assets, upon a settlement of its business, being less than the amount contributed by all to the common stock, should be divided among the partners, according to the amount of their contributions, and that the deficiency and loss should be borne by the partners in the same proportion in which they were to bear profits and losses; in

other words, that the minority of one of the partners gave him no advantage in the particulars named. Of him it was said: "He actually entered into the partnership, had the benefits of it while it lasted, and drew out the greater part of his contribution. The assets remaining at the time of the dissolution being insufficient to pay the claims of all the partners, the loss of capital must fall upon the three partners in equal proportions, and the infant cannot throw upon his co-partners the obligation of making up the deficiency."

In the case of *Furlong* v. *Bartlett*, 21 Pick. 401, one of the partners made a general assignment in the name of the firm, of all the partnership property, in trust, for the payment of the debts of the company, and delivered the property to the assignee. The other partner, who was a minor, ratified the assignment, but, on coming of age, brought an action against the assignee for the alleged unlawful taking and asportation of the property. It was held that trespass would not lie. In the decision of the case, it was said: "The court entertains strong doubts whether, under the peculiar circumstances of this case, any action will lie, or whether the plaintiff has any remedy, unless for his share of the balance, if the partnership should be ultimately solvent; but of this, as it is not now before the court, they express no opinion."

The case in 120 Mass., *supra*, is based upon the proposition that where an infant has enjoyed the benefits of that for which he paid his money, he cannot recover back the money. In support of the conclusion reached, the court cited *Breed* v. *Judd*, 1 Gray, 455; *Holmes* v. *Blogg*, 8 Taunt. 508; *Aldrich* v. *Abrahams*, Hill & D. 423; *Medbury* v. *Watrous*, 7 Hill, 110; *Heath* v. *Stevens*, 48 N. H. 251. The case of *Breed* v. *Judd* was based, really, upon two propositions: *First*, that, in order to rescind a contract, an infant must place the other party *in statu quo*; and, *second*, that an infant cannot rescind an executed contract where he has enjoyed the benefit of it. The ground of the judgment in the case of *Holmes* v. *Blogg* was that the infant had received something of value for the money he has paid, and that he could not put the other party in the same position as before. For those reasons it was held that the infant could not recover back the money he had paid on a

lease. In *Aldrich* v. *Abrahams* it was said: "It has been holden that by avoiding an executory contract, the infant only cancels his obligation to perform it. He does not acquire the right to recover back what he had paid, or for services which he had rendered, under the agreement while it remained in force. In the case of *Medbury* v. *Watrous*, the court indorsed the doctrine that where an infant pays money on a contract, and enjoys the benefit of it, and then avoids it, he cannot recover back the consideration paid; but suggested that if he has but partially enjoyed the benefits of the contract, he ought to be allowed to recover the difference. It was announced as the law, in the case of *Heath* v. *Stevens*, that an infant, upon rescinding an executed contract, may recover for what he has done or paid under it, provided he restore or account for what he has received under the contract.

It will be observed that the decision in the Michigan case above cited, is based upon the proposition that an infant cannot disaffirm a partnership agreement during his minority. The reasoning in that case was adopted in the Maryland case. The decision in the case in Paige was based largely upon the proposition that an infant cannot be permitted to retain the property purchased by him, and at the same time repudiate the contract upon which he purchased it. It may be said of most, if not of all, the propositions upon which the decisions in the cases cited are based, that they have not been regarded as the law in this State. We have stated them for the purpose of determining whether or not the conclusions in those cases may be regarded as correct, notwithstanding the propositions upon which they rest may be regarded as incorrect. The holdings by this court have been that all avoidable contracts by an infant in relation to personal property may be disaffirmed by him during minority. *Carpenter* v. *Carpenter*, 45 Ind. 142; *Manufacturing Co.* v. *Wilcox*, 59 Id. 429, and cases there cited; *Ayers* v. *Burns*, 87 Id. 245, and cases there cited; *Rice* v. *Boyer*, 108 Id. 472, and cases there cited, including cases by the Supreme Court of Vermont, Massachusetts, and New York. In support of the right of infants to disaffirm such contracts during minority, see, also, Tyler Inf. (2d Ed.) 70, 72, and cases there cited; Schouler Dom. Rel.

§ 409; 1 Lind. Partn. 83. The Supreme Court of Maryland, since the case above cited from that court, has held that an infant may thus disaffirm during minority. *Adams* v. *Beall*, Ct. App. Md. March 16, 1887. And so it has been the holding of this court that, in order to disaffirm and maintain an action during minority for his property or for money paid on a voidable contract, it is not necessary for the infant to return what he has received, or to place the other party *in statu quo*. *Pitcher* v. *Laycock*, 7 Ind. 398, and cases there cited; *Miles* v. *Lingerman*, 24 Id. 385; *Briggs* v. *McCabe*, 27 Id. 327; *Towell* v. *Pence*, 47 Id. 304; *Carpenter* v. *Carpenter*, *supra*; *White* v. *Branch*, 51 Ind. 210. The statute of 1881 has changed the rule as to real estate, but that change is not material here. Section 2945, Rev. St. 1881. And so, upon ample authority, this court has repudiated the doctrine that "if an infant advances money on a voidable contract, which he afterwards rescinds, he cannot recover this money back, because it is lost to him by his own act; and the privilege of infancy does not extend so far as to restore this money, unless it was obtained from him by fraud." *House* v. *Alexander*, 105 Ind. 109, and cases there cited.

The cases thus reviewed lend aid to the proposition that, in the case before us, appellant cannot, through the instrumentality of the court exercising equitable powers, and the receiver appointed by it, have the assets of the firm appropriated in the way of refunding to him what he invested in the business, and thus leave the firm creditors wholly or partially unpaid. And, so far as they sustain that proposition, we approve of them, although disapproving, in the main, the reasoning upon which they rest. Had appellant purchased the goods on his own account, and paid for them, he might have disaffirmed the contract and recovered the amount paid without first returning, or offering to return, them to the person from whom he purchased them. It does not follow from that, however, that, after having thus disaffirmed the contract, he could nevertheless hold the goods as against the person from whom the purchase was made. He would not be allowed to retain the goods after having thus recovered what he paid for them. When an infant thus repudiates a contract, he repudi-

ates it for all purposes. He cannot repudiate it so as to escape payment for an article purchased, and still hold the article as against the person from whom the purchase was made. As was said in the case in Paige, *supra*, when a contract is thus repudiated, the vendor may have his action to recover the goods from the infant, if they remain in his hands unchanged. And so, if appellant had purchased the goods on his own account, he might have disaffirmed the contract, and refused to pay for them without returning or offering to return them to the vendor. But, after having thus disaffirmed the contract, and refused to pay, he could not hold the goods as against the vendor. See *Kitchen* v. *Lee*, *supra*; *Rice* v. *Boyer*, 108 Ind. 472. What he could not do otherwise, he certainly cannot accomplish through a court of equity. Having gone into court and asked that the assets of the firm should be taken charge of by it, through a receiver, he must be held to have consented that the court shall deal with them and the rights of all concerned, as the law and equity may require. Having thus invoked the interposition of the court, he must be held to have consented that it shall close out the business, so as to settle the ultimate rights of the parties. If it be said that his disaffirmance of the contract is such as would otherwise have relieved him from the obligation to pay for the goods, then the court having charge of the goods has the right to see to it that they, or the money that may be realized from the sale of them, shall be returned to the vendor.

In our judgment, however, appellant's course has been such as to ratify the purchase of the goods, and all that has been done by the firm. He states in his bill that he "renounces the partnership arrangement, and asks to avoid and annul all of his obligations in that behalf;" but, at the same time, he treats the goods and assets on hand as partnership assets, and asks the court to take charge of and deal with them as such. His disaffirmance puts an end to the contract by which he became a member of the firm; but by asking the court to take charge of the goods as assets of the firm, as to them, he not only does not disaffirm, but ratifies all that was done in the purchase of them. As to them, he cannot disaffirm, and, at the same time treat them as partnership assets. Having

treated them as assets of the firm by asking the court to deal with them as such, the court will deal with them as partnership assets, as in any other case, and apply them first to the payment of the debts of the firm. 2 Lindl. Partn. *1040. This is not an action against the other party to recover a personal judgment against him for the amount paid into the business by appellant. What might be the rights of the parties in such an action, we do not decide. It is sufficient here that, in our judgment, the conclusions of law by the court below upon the facts found were correct, and the proper decree was entered.

Judgment affirmed, with costs.

The general subject of the rights and liabilities of infants as partners is well considered in the 5th edition of Lindley on Partnership, thus :—

"An infant may be a partner. But, speaking generally, whilst he is an infant, he incurs no liability and is not responsible for the debts of the firm; and when he comes of age, or even before, he may, if he chooses, disaffirm past transactions.

"The irresponsibility of an infant for the debts of a partnership of which he is a member, is an obvious consequence of his general incapacity to bind himself by contract, and does not require to be supported by any special authority. It might, perhaps, be thought that an infant who held himself out as a partner would be liable to persons trusting to his representations if they did not know him to be under age; but this is not so; and as an infant is not responsible for the torts of his agent, an infant partner cannot be held liable for the misconduct of his copartners. The irresponsibility of an infant as a partner seems therefore to be complete, except in cases of fraud.

"But an infant who was guilty of fraud was not so free from liability in equity, as he was at law; and equitable as distinguished from legal relief, *e. g.*, rescission of contract, may be obtained against him. In accordance with these principles, although, as a rule, an infant cannot be made bankrupt, yet if he fraudulently represents himself as of age, and obtains credit by his false representations, and is made bankrupt, the adjudication against him will not be superseded, and his deceived creditors will be paid out of his estate.

"Moreover, notwithstanding the general irresponsibility of an infant, he cannot, as against his copartners, insist that in taking the partnership accounts he shall be credited with profits, and not be debited with losses. The infant partner must either repudiate or abide by the agreement under which alone he is entitled to any share of the profits.

"An infant partner may avoid the contract into which he has entered, either before or within a reasonable time after he has come of age. If he avoids the contract, and has derived no benefit from it, he is entitled to recover back any money paid by him in part performance of it; but he cannot do this if he has already obtained advantages under the contract, and

cannot restore the party contracting with him to the same position as if no contract had been entered into.

"If, when an infant partner comes of age, he is desirous of retiring from the firm, he should express his determination speedily and unequivocally. It is true that by the Infants' Relief Act, 1874, promises made by a person who has attained twenty-one, to pay debts contracted before that age, cannot be enforced; but a person who retains a share in a partnership cannot retain it without its incidental obligations; and the doctrine of holding out is itself sufficient to impose liability upon an adult, although he may not long have attained his majority. This is well exemplified in *Goode* v. *Harrison* (5 B. & A. 147). There an infant was a member of a firm, and he was known to be a member. After he had attained twenty-one he did not expressly either affirm or disaffirm the partnership. He was held liable for debts incurred by his copartners subsequently to that time. A person who, before he comes of age, represents himself as a partner, must, when he comes of age, take care to notify that he has ceased to be a partner if he desires to avoid liability."

For the convenience of the practitioner we present a digest of the principal American cases upon the general subject of infant partners:—

An infant may be a partner, and his father, though indebted and insolvent, may release to his son all claim to his services; and the consent of the father to the son's becoming a partner is a release of his services: *Penn* v. *Whitehead*, 17 Gratt. 503.

An infant's partnership agreement is not void, but voidable only: *Dunton* v. *Brown*, 31 Mich. 182; *Osburn* v. *Farr*, 42 Id. 134. See, also, *Whitney* v. *Dutch*, 14 Mass. 457; s. c. Ewell's Lead. Cas. 38; *McGunn* v. *Hanlin*, 29 Mich. 476.

In an action upon a contract for goods sold and delivered to a partnership, one member of which is a minor, the plea of infancy may be interposed by him in bar of personal liability upon such contract: *Folds* v. *Allardt*, 35 Minn. 488.

As to the plea of *non est factum* and infancy in an action upon a promissory note against an alleged firm, see *King* v. *Barbour*, 70 Ind. 35.

Although an infant may become a partner, he cannot be held individually for the contracts of the firm, unless he ratifies them after majority: *Bush* v. *Linthicum*, 59 Md. 344.

An infant may rescind his agreement of partnership and recover back his investment therein, less the amount received from the firm: *Sparman* v. *Keim*, 83 N. Y. 245; s. c. 9 Abb. N. C. 1; reversing 44 N. Y. Super. Ct. 163. See, however, *Page* v. *Morse*, 128 Mass. 99; *Adams* v. *Beall*, 10 East Rep. 771.

As to when an infant may avoid his voidable acts, see, generally, Ewell's Leading Cases on Inf. & Cov. 92, 96, and cases cited.

To the point that an infant's ratification or avoidance must be *in toto*, if at all, see Ewell's Lead. Cases, 124, 161, 164, and cases cited.

As to what amounts to a ratification of a partnership by an infant, see Ewell's Lead. Cases, 169, 170, 175.

A minor entered into partnership in Sussex County with two others, and put in $1000. Before he came of age, the partnership was dissolved, the minor receiving his $1000. After the dissolution he removed to Huntington County, and A. recovered a judgment against the members of the firm, including the minor, without his knowledge. A. transferred the judgment to B. Three years afterwards B.

brought an action on the judgment, and recovered a second judgment, no process being served on the minor. B. caused an execution to be issued to the sheriff of Huntington County, and to be levied on the property of the minor there. The minor filed a bill stating the foregoing facts, charging fraud, etc., and obtained an injunction to stay proceedings on the execution: *Vansyckle* v. *Rorback*, 6 N. J. Eq. 234.

While an infant is a partner, his acts within the scope of the firm business will bind the firm: *Avery* v. *Fisher*, 28 Hun, 508 (an assignment); *Bush* v. *Linthicum*, 59 Md. 349.

A person against whom, with his partner, proceedings in insolvency have been instituted, cannot avoid them on the ground that his partner was an infant when the proceedings were begun, if the infant was then represented by a guardian *ad litem*, and has ratified the proceedings after arriving at age: *Winchester* v. *Thayer*, 129 Mass. 129.

Where a person engaged in business as copartner with another, and ostensibly competent to conduct it, incurs in form the usual liability appertaining to it, and escapes such liability by pleading infancy, it is not a just exercise of discretion to allow him to recover costs after having enjoyed the advantages of the purchase of property by the firm: *Yamato Trading Co.* v. *Hoexter*, 44 Hun (N. Y.), 491.

Where a father invests his own funds and personal services, or the funds of his children in his hands as guardian arising from an unauthorized sale of their property, in a partnership for their benefit, and the children afterwards seek to enforce the partnership in equity, the other partner cannot avail himself of these facts to avoid the contract: *Stein* v. *Robertson*, 30 Ala. 286.

Where one, being a widow and natural tutrix of her minor children, and having the posession and administration of the property of her deceased husband's succession during her life, entered into a partnership with the heirs, who were of full age, and slaves and other property of the succession were employed and used by the partnership, *held*, that the minor heirs were not, and could not be made by their natural tutrix, members of the partnership; and that they, consequently, after her death, had the right to sue for and recover from the surviving partners a debt due them by the partnership before a settlement and liquidation of partnership affairs: *Cuillé* v. *Gassen*, 14 La. Ann. 5.

To the point that the false and fraudulent declaration of an infant that he is of full age, made at the time of entering into a contract, does not prevent him from avoiding the contract at his election, see *Burley* v. *Russell*, 10 N. H. 184; *Conroe* v. *Birdsall*, 1 Johns. Cas. 127; *Ferguson* v. *Bobo*, 54 Miss. 121; *Merriam* v. *Cunningham*, 11 Cush. 40; *Norris* v. *Vance*, 3 Rich. 164; *Carpenter* v. *Carpenter*, 45 Ind. 142; *Curtin* v. *Patton*, 11 S. & R. 309; *Stoolfoos* v. *Jenkins*, 12 Id. 403; *Brown* v. *McCune*, 5 Sandf. 224; Ewell's Lead. Cas. 219.

Where the principal defendant in garnishment proceedings is a firm, a verdict discharging one of the partners because he is an infant does not release the garnishee: *Bethel* v. *Chipman*, 57 Mich. 379.

It seems that where two persons have held themselves out as partners, one of them being of full age, cannot be heard to allege, as against the firm creditors, that a contract of partnership was voidable because the other was a minor: *David* v. *Birchard*, 33 Wis. 492.

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